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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 642

PHILIP SAXNER and RUBIN SAXNER, doing business as PHIL'S TAVERN, and CHICAGO'S LAST DEPARTMENT STORE, an Illinois corporation,

Petitioners,

vs.

MARY ANN WAYNICK, et al.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION.

Petitioners feel compelled to make the following replies to certain contentions in respondents' brief in opposition to petition for certiorari.

I.

Reply to Respondents' Contention That The Decision Below Has Limited Application. (Resp. Br. p. 2)

Respondents seem to contend that this decision applies only to situations where liquor is furnished in one state and the injuries complained of occur in another state. Petitioners do not believe that the decision can possibly be construed to apply so narrowly. That is why we did not deem it necessary to add the interstate circumstances in the "question presented", as we explained in the footnote on page 2 of our brief.

To be sure, the decision was generated by the holding that there was no dram shop or civil damage recovery because of the interstate situation involved in the case, but the effect of the decision is not to confine its applicability to such situations only. There is no pronouncement in the decision itself that it shall be so limited, nor could any such limitation be logically sustained. If there is no common law right of recovery against furnishers of liquor, the fact that injury occurred in a state other than the one where the liquor was furnished cannot create such a right. If, on the other hand, there is such a right, it should be equally available to those who suffer injuries in the same state as where the liquor is furnished.

The reasoning of the respondents on this point appears to be that the decision applies only where action under existing dram shop or civil damage statutes is not available, due to interstate involvement, because of "the common law principle that for every wrong there ought to be a remedy". But this is fallacious reasoning. It assumes that the furnishing of liquor to an intoxicated person is a wrong, but, as we pointed out in our petition (pp.

9-10), it is not considered a wrong at common law. The fact that statutory remedies are not available in a given situation cannot create a common law tort out of conduct ordinarily considered not tortious.

Furthermore, it is not true that there is no remedy in such a sitaution. In the instant case, respondents certainly had a cause of action against the one responsible for the direct injury to them—the driver of the other automobile involved in the collision.

The decision of the court below cannot but be the occasion for releasing a flood of litigation, involving common law suits against liquor vendors, involving intra as well as interstate situations, and in states which do not have dram shop or civil damage statutes, as well as in states which do, in order to take advantage of the novel liability established by this decision. Already, as pointed out by respondents in their brief (pp. 12-14), since the issuance of the decision in the instant case, the Supreme Court of New Jersey, in the case of *Rappaport* v. *Nichols*, 156 A.2d 1, heavily relying on the decision in the instant case, allowed common law recovery against a tavern-keeper who sold liquor to a minor in favor of a person injured by the minor, and in a situation where both the furnishing of the liquor and the injuries occurred in the same state. From this flood of litigation, which is sure to follow if the decision below is allowed to stand, will come doubts, difficulties and great conflict between courts which desire to adhere to the established law in this field and those who desire to break with precedent.

II.

Reply to Respondents' Contention That The Decision Below Is Not of Novel Impression (Resp. Br. pp. 12-13)

Respondents seem to contend that the court below, in reaching its conclusion, simply applied standard established common law principles of tort liability, and that the decision therefore is not of novel impression. However, you cannot justifiably reach such a conclusion, by applying general principles of tort liability, when it is considered that the courts, by an unbroken line of decisions, have long ago rejected such argument with respect to liability of liquor vendors, and have firmly established that a vendor of intoxicating liquor is not, at common law, answerable to a third person for injury sustained by the latter as a result of the intoxication of the purchaser of the liquor. There is little doubt that the court below, in reaching its decision was allowing a right of action unknown to the common law. The decision below can only be considered as one which overrules all prior decisions and departs from the established doctrine that third persons have no common law right of action against vendors of intoxicating liquor.

The only cases which respondents cite as permitting recovery against tavernkeepers are *Pratt* v. *Daly*, 55 Ariz. 535, 104 P. 2d 147; *Swanson* v. *Ball*, 67 S.D. 161, 290 N.W. 482; *Schelin* v. *Goldberg*, 188 P.A. Super. 341, 146 A. 2d 648 (lv. to appeal denied by the Pa. Sup. Ct.); and *Rappaport* v. *Nichols*, 156 A. 2d 1.

Pratt v. *Daly*, *supra*, and *Swanson* v. *Ball*, *supra*, are inapplicable to the case at issue because they involve situations where the tavernkeepers have an established special duty toward the injured party (See p. 10 of our petition and footnote 11 on that page).

Rappaport v. *Nichols*, *supra*, first brought to light by respondents (Res. Br. pp. 13, 18), does not detract from the proposition that the instant case is of novel impression, because it simply follows in the footsteps of the instant case and adopts its new concepts of liability. It was decided after the decision in the instant case, relies heavily on it, and is encouraged by it to break with precedent. It is simply in the vanguard of decisions, contrary to established law, which are likely to follow in the wake of the decision in the instant case. The court in *Rappaport* v. *Nichols*, however, admits quite openly that, in permitting common law recovery against a tavernkeeper by a third party, it is stepping out of line and departing from established law. It says, on this point, at page 4 of its decision:

> "Judges elsewhere have dealt with the issue of whether tavernkeepers who unlawfully sell alcoholic beverages to persons who are already intoxicated or to minors who become intoxicated may properly be subjected to common law claims grounded on negligence where the intoxicated persons leave the taverns, carelessly drive their cars and injure others. Most of them, while acknowledging the justness of the common law principles which generally result in the imposition of liability for negligent conduct which cause injury to others, have rejected such claims. (citing many cases)"

It is to be noted, too, that all of the foregoing cases cited are in states which have no dram shop or civil damage statutes. Both *Rappaport* v. *Nichols*, *supra*, and *Schelin* v. *Goldberg*, *supra*, present situations where existing civil damage statutes had been repealed prior to the occurrence in question. Query whether the courts would have permitted common law recovery in these cases if there had still been in existence in the states in question civil damage statutes?

We pointed out in our petition (pp. 14-19), that in states having civil damage statutes, the courts have given a second and additional reason for not allowing civil damage actions against liquor vendors. This is the prevailing and uniform view that where there exists a civil damage statute, such statute has preempted the field, holding that no action for civil damages exists except that given by the statute, and that the remedy by statute cannot be enlarged except by further legislative enactment. Respondents seem to have entirely ignored this point in their brief. Suffice it to say, however, that no decision in any state which does not have dram shop or civil damage statutes can be cited as being contrary to the rule in dram shop or civil damage states that there exists no common law action, because it does not take into consideration the question of preemption by the statute.

III.

Reply to Respondents' Contention That The Decision Below Does Not Fail to Follow Applicable State Law in Violation of the Rule of Erie v. Tompkins. (Resp. Br. pp. 5-17)

It appears that respondents agree with petitioners that, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, federal courts, when deciding questions of conflict of laws in diversity of citizenship cases, must follow the rules prevailing in the state in which they sit.

Then respondents go on to say that in questions of conflict of laws, "Illinois will apply the place where the tort occurred". But what do respondents mean by "the place where the tort occurred"? Do they mean by it the place where the effects of allegedly tortious conduct have taken place, or the place where the conduct itself has been carried on? In the instant case, the alleged tortious

acts were the sales of liquor to intoxicated persons, and this all took place in Illinois—only the alleged effects of the sales, the injuries, took place in Michigan. The real question, in cases where the alleged wrongful act took place in one state and the injuries occurred in another state, is whether the Illinois conflict of law rule requires the application of the law of the state where the act took place or the law of the state where the injuries occurred.

The Illinois cases cited by respondents on page 6 of their brief; *i.e.*, *Mithen* v. *Jeffrey*, 259 Ill. 376, 102 N.E. 778; *Christiansen* v. *William Graver Tankworks*, 223 Ill. 142, 79 N.E. 97; *Opp* v. *Pryor*, 294 Ill. 538, 128 N.E. 580, do not decide this issue because they are all cases where the negligent act and the injury occurred in the same state, and are therefore not authority for respondents' contention that the law of Michigan should be applied in the instant case.

It is true that the courts of a great many states, in applying the rule that problems of the law of torts are to be decided under the law of the place where the alleged wrong took place, have come to identify the "place of wrong" as the place where the effects of allegedly tortious conduct took place, rather than the places where the conduct itself has been carried on. This place-of-harm rule, however, has been criticized frequently and severely. See, for example, articles by Professor Max Rheinstein, in 19 Tulane Law Review, pages 431 and 165-199, pointing out that this place-of-harm rule has been produced by historical accident, rather than through considerations of deliberate policy, and that its mechanical application results in unjust decisions which defeats the very policies for whose benefit the whole field of conflict of laws has been invented.

133 A.L.R. 263, which respondents cite on page 6 of their brief, contains annotations, alphabetically by juris-

dictions, of all cases which have followed this place-of-harm rule. There are no Illinois cases listed in this annotated report, however, because Illinois has never adhered to this unjust and fallacious rule.

The Illinois conflict of laws rule requires the application of the law of the state where the act, claimed as the basis of a tort, occurred, in determining whether there is a tort as a legal consequence, or whether the conduct was of a tortious character. Respondents complain that petitioners do not cite Illinois cases to support their position that this is the rule in Illinois. But we cite in support of this point decisions of several federal cases which set forth the Illinois conflict of law rule. (See petition p. 20). The *Addressograph-Multigraph Corporation* v. *American Expansion Belt & Manufacturing Co.* case, cited therein, was a suit for unfair competition, based on alleged misappropriation of plaintiff's system of marketing mechanical addressing machines by introduction into that system of the address plates of defendant, which had its principal place of business in Illinois where it received and filled orders for plates. Plaintiff did not want the law of Illinois to apply, contending that the wrongs to plaintiff by reason of defendant's false advertising and libelous statements were accomplished at the point that these charges were in legal contemplation published, that is, where the plaintiff's customers and the public read such charges, which was outside the State of Illinois, and which was where the damage was done. The Seventh Circuit Court of Appeals, in rejecting this argument, stated:

> "We do not agree with this contention. As pointed out heretofore, the main charge of unfair competition was a misappropriation by the defendant of plaintiff's business system. The essential element of this wrong was the manufacture and sale by the defendant of

plates for the purpose of use in certain machines manufactured and sold by the plaintiff. Defendant's place of business was in Illinois where it received and filled orders for such states. The wrong, if such it be, was the sale in Illinois for the use indicated. In our judgment there is no merit in plaintiff's argument that no wrong was committed until the plates were actually used in a foreign state . . ." 124 F. 2d 706, 709."

In a similar type of situation, the case of *Ferroline Corp.* v. *General Aniline & Film Corp.*, also cited on page 20 of our petition, the Seventh Circuit Court of Appeals said:

"Since our jurisdiction rests on diversity of citizenship, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the law of the forum, Illinois is determinative of the substantive issues, including the issue of conflict of laws. *Smith* v. *Dravo Corp.*, 7 Cir., 203 F. 2d 369. The action here sounds in tort, the liability for which the courts of Illinois determine by the place of the wrong. *Smith* v. *Dravo Corp.*, *supra*. This is New Jersey, for it was there that defendant appropriated the information received to its benefit, and, allegedly, wrongfully to plaintiff's detriment." 207 F. 2d 912, 920.

Respondents, whose same counsel were in this case from its inception, point out that the court below was aware of the decision of the case of *Busser* v. *Noble*, 22 Ill. App. 2d 443, 161 N.E. 2d 150, before rendering its final decision in the instant case. (Resp. Br. p. 15). This makes it even clearer that the court below, in deciding the instant case, departed not only from general Illinois principles as to common law tort liability of dram shop keepers, but as well from decisions of Illinois Courts on the precise question facing the court below in the instant case. Respondents contend that the *Busser* case has distinguishing features, but the differences are not such as

should affect the decision. The same statutes are involved, and the question presented is substantially the same in both cases. The Court, in the *Busser* case, did not hold, as respondents contend, that plaintiffs did not have a cause of action under Section 131 because they could recover under Section 135, but held, in effect, that because there is a civil damage statute in Illinois (sec. 135), it has preempted the field so that no other action for civil damages exists. Petitioners were correct in stating that the instant case and the *Busser* case reached diametrically opposite results.

Respondents take petitioners to task for their reasoning that the common law of Michigan on the question in issue is the same as the general common law rule applicable to the situation because the question has never been passed on by any Michigan Court of review. (Resp. Br. p. 14). However, *this is perfectly valid reasoning in view of the well settled rule of law in most jurisdictions that, in the absence of proof to the contrary, the common law is presumed to be in force in sister states which were originally under common law jurisdiction.* 15 C.J.S., Common Law, sec. 20; *Opp* v. *Pryor*, 294 Ill. 538, 128 N.E. 580; *Miller* v. *Miller*, 257 Ill. App. 287; *Grinestaff* v. *N.Y.C.R.R.*, 253 Ill. App. 583; *Barrow* v. *Phillips*, 250 Ill. App. 587. The Michigan authorities recognize that this is the situation in Michigan. 15 Michigan Law and Practice, title Liquor, sec. 61, p. 543, although citing no Michigan cases in support thereof, states as follows:

> "At common law, apart from statute, there was no remedy against the dispenser of liquor for injuries and damage resulting from the acts of intoxicated persons."

Thus, in applying Illinois law that there is a presumption that the common law of a sister state is the same as its own, the court below was bound to presume that Michi-

gan law on the question was the same as that of Illinois, unless there was specific proof to the contrary.

Respondents devote a great deal of space (Resp. Br. 8-12) and effort in an endeavor to demonstrate that the Michigan common law on the question in issue is contrary to the general prevailing view at common law that there is no cause of action against one who sells liquor to an intoxicated person in favor of the person injured by the intoxicated person, at least to the extent that it permits a cause of action in the instant case. This they do by laboriously gathering from various Michigan cases, many on subjects far removed from the one involved in the instant case, statements on various elements which go to make up a tort, and claiming that the sum total of them add up to give the plaintiffs a cause of action under the common law of Michigan. We submit that this is wasted effort and to no avail, in view of the well established common law rule on the specific subject covered in the instant case. Respondents cannot by using general principles of tort liability overcome a specific common law rule as to a specific situation.

The court below neither followed applicable Illinois law nor applicable Michigan law in violation of the rule of *Erie* v. *Tompkins*.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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